police or magistrates, *Supp* v. *Keusing,* 28 N. Y. Super. Ct. 609, or because the remedy in damages was adequate, *Herrington* v. *Herrington,* 11 Ill. App. 121, and in *R. R. Co.* v. *Walton,* 14 Ala. 207, it is broadly stated that, "Equity cannot * * * restrain the commission of a personal trespass, although it may be threatened." It is true that the commission of acts threatened by strikers have been enjoined where the effect of such threats was to interfere with the continuation of complainant's business or his right of freedom to contract. *Vegelahn* v. *Gunter,* 167 Mass. 92, 35 L. R. A. 722; HUTCHINS' AND BUNKER'S CAS. 764. See also, 2 MICHIGAN LAW REVIEW, 321. Here, however, the threatened personal injury does not stand alone but is connected with the violation of property rights.

THE POWER OF COURTS TO ALLOW AMENDMENTS UNDER THE COMMON LAW AND CODE PROCEDURE.—Concerning the question as to the comparative merits of the common law and code procedure, a recent case decided by the Supreme Court of Illinois is of more than passing interest. The common law system of pleading is in use in Illinois but this decision, made under the Practice Act of 1874, could not but satisfy the most radical advocate of the reformed procedure.

An affidavit for attachment stated that the defendant was indebted to the plaintiff on various drafts and acceptances obtained by means of gross forgeries and other criminal and fraudulent devices. A declaration was filed in trespass on the case seeking to recover the indebtedness, and an amended declaration was filed in assumpsit, and it was held that the declaration and the amended declaration did not state different causes of action, but plaintiff had merely changed his form of action. *May* v. *Disconto Gesellschaft,* — Ill. — (1904), 71 N. E. Rep. 1001.

It need hardly be stated here in view of the decision in this case that the Practice Act already referred to and the decisions under it give to the courts of Illinois a power over the amending of pleadings not exceeded by the power exercised in the most liberal of the code states, excepting perhaps New York, where it has been held that a plaintiff may by amendment change the cause of action to one of a different class, namely from an action in tort to one in contract. *Hopf* v. *U. S. Baking Co.,* 21 N. Y. Supp. 589, 591. In the absence of statutory enactment to the contrary, the form of action may not be changed. At the common law, the form primarily governed, because it identified the action and the choosing of the proper form was, as it were, to choose the proper weapon from the arsenal of forms, and was therefore a precarious undertaking. If facts inconsistent with the form chosen appeared upon the face of the pleading, the error might properly be taken advantage of by demurrer; if they did not so appear but were revealed at the trial, the proper practice was to nonsuit the plaintiff. CHITTY, PLEADING,* p. 220. In either event the decision was not upon the merits, and the pleader might make another choice of weapons. While this stringent rule has been generally abrogated by statute, there remain a few notable exceptions. In Wisconsin, since *Carmichael* v. *Argard,* 52 Wis. 607,

the rule to the effect that "a change in the form of the action is a substantial change in the claim within the meaning of the statute," has been firmly adhered to. *Gates* v. *Paul,* 117 Wis. 170. The same doctrine obtains also in Rhode Island, where the court says in *Slater* v. *Fehlberg,* 24 R. I. 574, "The statute is not sufficiently broad to permit a change in the form of the action."

The rule generally laid down to the effect that no amendments which change or alter the cause of action contained in the original pleading, are allowed, has, in legal actions, been maintained by an overwhelming weight of judicial authority and must be considered as the settled doctrine on the subject. *Doyle* v. *Pelton,* — Mich. — (1903), 96 N. W. Rep. 483; *Proctor* v. *Southern Ry. Co.,* 64 S. C. 491; *N. Westover & Co.* v. *Van Dorn Iron Works Co.,* — Neb. — (1903), 97 N. W. Rep. 589; *Ex parte Mansfield,* 11 App. D. C. 558; *Gilleland* v. *L. and N. Ry. Co.,* 119 Ga. 789. Various questions present themselves, among the most important of which are, What is the cause of action sued upon; Does the amendment merely amplify the statement of facts already made (*Woodward* v. *Miller,* 119 Ga. 618, 622); state it in different form, still relying on the original cause of action (*Robertson* v. *Springfield and S. R. Co.,* 21 Mo. App. 633); or does it seek to introduce some material allegations which create a cause of action where none existed before (*Ex parte Mansfield,* supra); or does it seek to change the facts so as to permit the plaintiff to recover on a matter not anticipated by the defendant and therefore to his prejudice (*Bermel* v. *Harnischfeger,* 89 N. Y. Supp. 1029)?

Various tests have been resorted to to determine the question. (1) Would a recovery under the original complaint have barred any further recovery under the proposed amended complaint? *Coyle* v. *Davidson,* 86 N. Y. Supp. 1089; *Davis* v. *N. Y. R. R. Co.,* 110 N. Y. 646. (2) Would the same evidence have been required to support and would the same judgment have been rendered in the one case or in the other? *Grigsby* v. *Barton Co.,* 169 Mo. 221, 225; *Boeker* v. *Crescent Belting & Packing Co.,* 101 Mo. App. 429. (3) Does the amended declaration set out a new act or thing as the cause of action, or does it only state in a different form the original act or thing as the cause? *Metropolitan Life Ins. Co.* v. *People,* 106 Ill. App. 516, affirmed in 70 N. E. Rep. 643.

"The primary right and duty and the delict or wrong combined constitute the cause of action." POMEROY, CODE REMEDIES, § 347 (4th ed.); also, note, page 461; WORDS AND PHRASES, title, "Cause of action," p. 1015. It has, however, been frequently held that the cause of action is the particular matter for which suit is brought and when the object of an amendment is not to forsake this but to adhere to it, it is the duty of the court to permit the amendment. *Erie City Iron Works* v. *Barber,* 118 Pa. State 6, 17. Neither is the changing of the form of the action from one ex contractu to one ex delicto objectionable providing the petition still relates to the same transaction. *Robertson* v. *Springfield & S. R. Co.,* supra. Although it is generally held that one may waive a tort and sue in assumpsit, yet after having elected to sue in tort, he cannot, after trial, recover in assumpsit, or vice

versa. *Bermel* v. *Harnischfeger,* supra; *Walter* v. *Bennett,* 16 N. Y. 250; *People* v. *Circuit Judge,* 13 Mich. 206; *Ramirez* v. *Murray,* 5 Cal. 222; *Supervisors* v. *Decker,* 30 Wis. 624. But an examination of these cases reveals the fact that they refer generally to amendments conforming the pleadings to the proof and if granted would prejudice the defendant in his defense. They do not hold that a claim in tort may not be amended into a claim in contract.

We believe the decision in the principal case to be in accord with the spirit of the statute under which the decision purports to be made. The spirit of the codes and of the statutes relating to amendments in the various states aims at changes in the substance of pleadings rather than in their form, and they should be construed so as to give effect to that purpose. As was said by a recent author, referring to the refusal of the Wisconsin court to permit a change of the forms of action, "But these relics of the older theory are not so common as to affect very seriously the truth of the proposition that the restriction imposed by the codes forbidding an amendment which would 'change substantially the claim or defense' does not refer to the form of the remedy but to the general identity of the transaction constituting the cause of action." HEPBURN, DEVELOPMENT OF CODE PLEADING, p. 266; BLISS CODE PLEADING, § 429.

SITUS OF DEBTS.—A recent decision of the Court of Appeals of New York (*National Broadway Bank* v. *Sampson,* 71 N. E. Rep. 766—see post "Recent Important Decisions") gives new evidence of the persistency of this pernicious invention, which promises yet to eclipse the doctrine of witchcraft in the number of its victims.

The doctrine of situs consists of a theory that rights of action for debt have a locality for certain purposes, so that they abide at the residence of the debtor or creditor, at the place of contract or the place of performance, or somewhere else; though the advocates of the doctrine sadly fail to agree as to which of these places is the *locus quo.*

Imagine a collection attorney handing out this bit of legal wisdom to his client. A New York merchant goes to his local attorney with an account for collection against John Doe, absconding debtor of the same city, saying: "He cannot be found and has no effects here; but I am told that Richard Roe, a responsible merchant residing and in business at Canton, Ohio, is indebted to him in a large amount." This attorney, well instructed by a recent perusal of the late decisions of the highest court of his state, now cheerfully informs his client: "Our court has held that the right of action resides with the creditor; so that there is no occasion to send this claim away for collection, it abides with you, sue here. Better yet, by the same rule Doe's claim against Roe also abides here at Doe's domicile. Let us sue and attach here." Under these circumstances would not a business man of any sense, not being learned in the law, begin to look for another lawyer?

When the Supreme Court of the United States decided the case of *Chicago R. I. & P. Ry. Co.* v. *Sturm* (1899), 174 U. S. 710, 19 S. Ct. 797, many students of this subject hoped that a fatal blow had been dealt to this